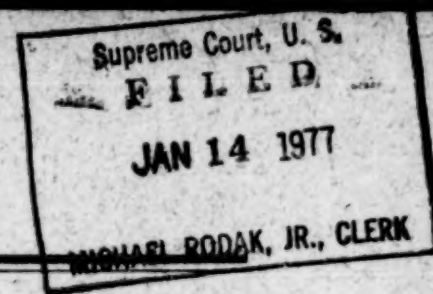


No. 76-681



In the Supreme Court of the United States

OCTOBER TERM, 1976

THE NATIONAL BANK OF NORTHERN NEW YORK,
EXECUTOR OF THE LAST WILL AND TESTAMENT OF
ELIZABETH M. HAAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-15a) is not officially reported. The opinion of the court of appeals (Pet. App. 16a-38a) is reported at 540 F. 2d 579.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1976. The petition for a writ of certiorari was filed on November 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether bequests to two cemetery associations, organized as not-for-profit corporations, are deductible for estate tax purposes as bequests to organizations "organized and

operated exclusively for * * * charitable * * * purposes * * * " under Section 2055(a)(2) of the Internal Revenue Code of 1954, where the associations provided no free or below-cost services to the indigent.

STATUTE INVOLVED

The relevant portions of Section 2055(a) of the Internal Revenue Code (26 U.S.C.) are set forth as pp. 2-3 of the petition.

STATEMENT

Petitioner is the executor of the will of Elizabeth M. Haas, who died in 1966. In her will, the decedent left \$25,000 to the Grove Cemetery Association of Lafargeville, New York, with directions to use the income from the sum for the care and maintenance of a specific family plot. Any surplus was made available for the "general care of the Cemetery" (Pet. App. 2a). The five million dollar residue of her estate was to be divided equally between the respective endowment funds of Trinity Church of Watertown, New York and the Watertown Cemetery Association, with the income to be used for the purposes of the respective legatees (Pet. App. 3a).

On the federal estate tax return, petitioner claimed a deduction for both the \$25,000 specific bequest and the residuary bequest to the cemetery associations under Section 2055(a) of the Internal Revenue Code of 1954, as transfers for charitable or religious purposes. On audit, the Commissioner of Internal Revenue disallowed the deductions for all but \$2,000 of the \$25,000 specific bequest to the Grove Cemetery Association, and for the entire residuary gift to the Watertown Cemetery Association.¹

¹The parties stipulated that \$2,000 of the \$25,000 specific bequest represented the actual cost of obtaining perpetual care services. The government does not contest the deductibility of the \$2,000 item as a funeral expense under Section 2053(a)(1) of the Code (Pet. App. 5a).

Petitioner thereupon commenced this refund suit in the United States District Court for the Northern District of New York to recover the additional estate taxes it paid as a result of the Commissioner's disallowance of these deductions. The Watertown Cemetery Association joined as a plaintiff with petitioner (Pet. App. 1a).

At the time of decedent's death, both cemeteries were governed by the New York State Not-For-Profit Corporation Law (Pet. App. 3a). The parties stipulated that the sole activity of each cemetery association is the ownership, operation and maintenance of a cemetery. They further stipulated that no part of the net earnings of either cemetery association inured to the benefit of any private stockholder or individual other than as an object of the purposes of the association; that no substantial part of the activities of either association was in carrying on propaganda, or otherwise attempting to influence legislation; and that neither association participated in any political campaign on behalf of any candidate for public office. Both associations were incorporated in the mid-nineteenth century for the sole purpose "of procuring and holding lands to be used exclusively for a cemetery or place of burial of the dead" (R. 57a-58a).²

The Watertown Cemetery Association's revenues arise solely from the sale of burial plots, charges for care and maintenance of burial plots, income and endowments and funds set aside for maintenance purposes, and gifts and bequests (R. 57a-59a). The Watertown Cemetery Association is currently exempt from income tax under Section 501(c)(13) of the Code, as a cemetery company "owned and operated exclusively for the benefit of their members or which * * * [is] not operated for profit * * * " (R. 70a).

²"R." refers to the joint appendix filed in the court of appeals.

The district court held that the cemetery associations were not organized and operated exclusively for charitable or religious purposes within the meaning of Section 2055(a), so that decedent's bequests to them were not deductible under the federal estate tax as charitable contributions. It also dismissed the complaint of Watertown Cemetery Association on the ground that as a non-taxpayer it was not a proper party to the refund suit (Pet. App. 14a). A divided court of appeals affirmed. It likewise held that the cemetery associations were not "charitable" organizations. In its view, the fact that the cost of the cemetery associations' activities would otherwise have been borne by the government was insufficient to render them "charitable" for purposes of the estate tax provisions (Pet. App. 16a-25a).

ARGUMENT

1. Section 2055(a)(2) of the Internal Revenue Code of 1954 allows an estate tax deduction for bequests "to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * * ." Although neither the statute nor the underlying Treasury Regulations define the term "charitable," the courts have looked to Section 501(c)(3) of the Code, which accords tax-exempt status to such organizations. Section 1.501(c)(3)-1(d)(2) of the Regulations provides that the term "charitable" is used "in its generally accepted legal sense" and includes "[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes."

Here, the court of appeals correctly held that the two cemetery associations to which decedent made testamentary gifts were not "organized and operated exclusively

for religious [or] charitable * * * purposes" within the meaning of Section 2055(a) (2). As the court noted, "the district court found * * * [that] '[t]he Cemetery Associations did not make it a practice of providing free burial to indigents, nor is it their "usual custom" to provide any plots at reduced prices' " (Pet. App. 21a). Indeed, the only other appellate decision presenting the question likewise held that a bequest to a cemetery association was not deductible for estate tax purposes where the association did not provide any burial space to indigents either without charge or for less than fair market value. *Gund's Estate v. Commissioner*, 113 F. 2d 61 (C.A. 6), certiorari denied, 311 U.S. 696. Here, as in *Bank of Carthage v. United States*, 304 F. Supp. 77, 80 (W.D. Mo.), "the rich, the poor, and the in-between are treated alike. * * * Thus, the conclusion is inescapable that the [cemetery's] funds are not used *exclusively for charitable purposes*" (emphasis in original).

2. Petitioner argues (Pet. 12-13) that the cemetery associations are "charitable" within the meaning of Section 2055(a)(2) because they perform a function that would otherwise be provided by the state or local government. In its view, the associations are engaged in "lessening of the burdens of Government," one of the "charitable" purposes set forth in Treasury Regulations, Section 1.501(c)(3)-1(d)(2). But the court of appeals correctly recognized that the fact that an organization performs a function that would otherwise be provided by the government does not automatically make it a "charitable" one. In order to qualify as "charitable," the organization must be operated exclusively for charitable purposes. Thus, the existence of a single substantial noncharitable purpose is sufficient to foreclose "charitable" status, even though the organization may be performing other numerous or important charitable functions. See, e.g., *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283; *St. Louis*

Union Trust Co. v. United States, 374 F. 2d 427 (C.A. 8); *Contracting Plumbers Cooperative Restoration Corp. v. United States*, 488 F. 2d 684, 686 (C.A. 2), certiorari denied, 419 U.S. 827.

Here, the courts below found that the cemetery associations' primary function and activity was the sale of burial plots. The only beneficiaries of the associations' activities were those persons who purchased burial plots. Thus, any benefit to the public at large or to the state and local governments was only incidental to the primary activity of selling plots. Since the cemetery associations operated primarily for the benefit of their patrons, the court of appeals correctly held that they were not "charitable" within the meaning of the statute. *Duffy v. Birmingham*, 190 F. 2d 738 (C.A. 8); *Underwriters' Laboratories v. Commissioner*, 135 F. 2d 371 (C.A. 7).

Finally, the history of the tax treatment accorded to cemetery associations further supports the decision below. As the court of appeals noted (Pet. App. 19a-20a), the 1939 Code did not address the income or estate tax consequences of donations to cemetery associations. In 1954, Congress provided an express income tax exemption in Section 501(c)(13) for "[c]emetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit * * *." Donations to such cemetery associations were made deductible for income tax purposes by the addition of Section 170(c)(5). Since Congress enacted no similar estate tax provision enlarging the scope of the deduction to cemetery associations, and did not include such organizations within the definition of "charitable," it is reasonable to conclude that it did not intend to provide estate tax deductions for bequests to cemetery associations simply because their activities might be otherwise undertaken by the government.

3. Contrary to petitioner's assertion (Pet. 10), the decision below does not conflict with *St. Louis Union Trust Co. v.*

United States, 374 F. 2d 427 (C.A. 8), or *Dulles v. Johnson*, 273 F. 2d 362 (C.A. 2). Those cases uphold the deductibility of bequests to various bar associations. But unlike the cemetery associations at issue here, those cases turn on the conclusion that the total activities of those bar associations were "charitable, scientific * * * [and] educational" within the meaning of the statute. Moreover, the cases petitioner cites dealing with the tax-exempt status of hospitals rest on the rationale that the promotion of health is a charitable purpose within the meaning of Section 501(c)(3). See *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F. 2d 1278, 1287 (C.A. D.C.), vacated and remanded on other grounds, 426 U.S. 26.³

4. Finally, petitioner contends (Pet. 15-19) that the denial of its charitable deduction deprives it of its right to equal protection because a bequest to a church-operated cemetery would be deductible under Section 2055. In petitioner's view, a bequest to a non-church-operated cemetery deserves an estate tax deduction because it is equally beneficial to the public good.

Bequests to church-operated cemeteries are deductible because the church to which the bequest is made is itself organized and operated exclusively for religious purposes as required by the statute, and the cemetery is ancillary to the institution's religious functions (*Estate of Audenried v. Commissioner*, 26 T.C. 120, 125, *acq.*, 1956-2 Cum. Bull. 4). But contrary to petitioner's assertion, there is no "religious test" (Pet. 17) for qualification

³ *Monterey Public Parking Corp. v. United States*, 481 F. 2d 175 (C.A. 9), upon which petitioner relies (Pet. 11), does not conflict with the decision below. There, the court held that the benefits derived from the operation of an off-street public parking facility corporation by merchants outweighed the private benefits to the merchants, so that the corporation qualified as both a "charitable" and "social welfare" organization under Section 501(c) (3) and (4).

for a deduction under Section 2055(a)(2). The decision here turns not on the non-religious character of the cemetery associations but on the fact that they were not exclusively operated for charitable purposes. As the court of appeals noted (Pet. App. 20a), quoting from *Gund's Estate v. Commissioner, supra*, 113 F. 2d at 62, a not-for-profit cemetery association "doubtless could be so organized and operated as to be a charitable organization within the meaning of the [Internal Revenue Code] * * * ." Petitioner, however, was not so organized and operated.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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